IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2006

CORAM:

THE HONOURABLE MR. JUSTICE V. DHANAPALAN

C.M.A. No.613 of 1998

The Regional Director
E.S.I. Corporation
143 Sterling Road
Madras 600 034 ...Appellant

vs.

1. Domore Tools & Accessories (P) Ltd
represented by its Director
C. Sampath Kumar
Madras 600 058

2. The Special Tahsildar
E.S.I. Recoveries
Madras 600 005 (given up) ...Respondents

Civil Miscellaneous Appeal filed under Section 82 of the Employees' State Insurance Act, 1948 against the judgment and decree passed by the Principal Judge, City Civil Court, Madras in E.S.I.P. No.68 of 1987 dated 25.11.1996.

For appellant Mr. G. Desappan

For 1st respondent Mr. Jagadish Chandra
for Mr. J. James

J U D G M E N T

This Civil Miscellaneous Appeal preferred by E.S.I. Corporation arises out of the judgment and decree dated 25.11.1996 passed by the Principal Judge, City Civil Court, Madras (in short "the Tribunal) in E.S.I.P. No.68 of 1997 in and by which the petition filed by the first respondent herein was allowed.

2. The first respondent herein (in short "the Company) filed a petition under Section 75 of the Employees' State Insurance Act, 1948, (in short "the ESI Act") before the Tribunal to set aside the

orders dated 16.12.1983, 19.06.1986 and 25.08.1986 passed by the Employees' State Insurance Corporation (in short "the Corporation") under Section 45-A of the ESI Act and also to declare that the Company is not liable to pay any further contribution or interest except the short payment of Rs.39/-.

3. Before the Tribunal, the Company's case was that, formed in 1969, it functioned normally upto 1973 and in the middle of 1974, it became sick but was not wound up, keeping in mind, the welfare of its employees. The Company's bankers, in 1978, withdrew their support and also initiated legal proceedings against the Company to recover the dues from the Company. SIPCOT helped the Company in the process of rehabilitation and normalcy was restored from the year 1986. The Corporation issued notices under Section 45-A and sent several claims to the Collector for recovery for the period between 1974 and 1986 towards contribution and interest. The Company had paid a sum of Rs.16,735.75 till 1985 and in 1986, it had paid a sum of Rs.22,275/- in all. According to the Company, the C-18 notices issued by the Corporation did not contain enough particulars, no personal hearing was afforded to it and the Corporation determined the contribution based on assumed wages of Rs.350/- per month which is on the higher side.

4. In response, the Corporation filed a written statement contending that the Company's petition against Form C-18 dated 05.06.1981 and 24.04.1984 were barred by limitation. It was the Corporation's further contention that it had issued show cause notice dated 02.06.1983 calling upon the Company to show cause as to why contribution for the period 01.10.1979 to 26.09.1981 should not be assessed and the entire records required to be inspected by the Inspector were not made available by the Company.

5. The Company, in support of its case, examined one witness and marked twenty five documents and the Corporation, for its part, examined two witnesses and marked two documents. The Tribunal, after analysing the evidence of both sides, allowed the petition by setting aside the four impugned orders and declared that the Company is liable to pay only Rs.39/- towards short payment.

6. Heard both sides.

7. Mr. G. Desappan, learned counsel for the appellant Corporation would contend that having held that the petition against A.3, 45-A order is barred by limitation, the Tribunal ought not to have set aside the same. By drawing the attention of this Court to Section 45-A, he would contend that in case of failure on the part of the employer to show cause and to appear for enquiry, the Corporation has every right to pass orders based on the available material and notional value. It would also be his contention that the employer failed to establish that the payments were made in respect of the claims made under the impugned order.

8. To add strength to his contentions, Mr. Desappan has relied on the following three citations and they are as under:
i. The decision of the Madras High Court reported in 2000 (4) LLN 927 in the case of Regional Director, Employees' State Insurance Corporation & Samsons Rubber Industries (Private) Limited. (para 13)
"The Employees' State Insurance Act, 1948, is a special enactment, and as such, it would overrule the general enactment. The period of limitations set forth in the special Act have got to be adhered to. Section 77 (1A) is so clear that ever such application shall be made within a period of three years from the date on which, the "cause of action" arose. Admittedly, the cause of action arose on 4 July 1980, and hence, the petition should have been filed within three years from that date onwards. But the petition was filed only on 7 March 1986, and the same cannot be held that it is in time."

ii. The judgment of the Delhi High Court reported in 1982 LAB I.C. 833 in the case of Employees' State Insurance Corporation, New Delhi v. Masco Private Limited, Delhi: (para 11)

". . .Hearing was already given prior to reaching the stage of Section 45A. It is only when the offer of hearing has been turned down by not filing returns or furnishing particulars and thus a stage has reached where it is not possible for the Corporation to discharge its functions under Section 45, that resort is made to Section 45A of the Act. It would be nullifying the purpose of Section 45-A if a fresh enquiry was to start again by seeking to associate a defaulter employer at that stage. It must be appreciated that the Act is a beneficial piece of legislation for the benefit of the employees. . . ."

iii. The Supreme Court's judgment reported in AIR 1977 SC 1351 in the case of The Employees' State Insurance Corporation, Bhopal vs. The Central Press and another: (para 2)
"It appears that the respondents-employers failed to maintain the registers or records and to submit returns of wages paid as required under Section 44 of the Act. Hence, the Insurance Court, which was called upon to adjudicate under Section 75 (1)(c) of the Act, on the matter in dispute, found itself unable to decide the question on issue. It dismissed the application on the ground that there was no provision for deciding such a dispute on an "ad hoc basis". We fail to understand what is precisely meant by "adhoc basis". We find that Section 75(2) of the Act provides inter alia that a claim for the recovery of contributions shall be decided by the Employees' Insurance Court. Not only is the mandatory duty cast upon it to decide such disputes, but it is armed with the powers of a Civil Court, including summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, under Section 78 of the Act."
9. Per contra, Mr. Jagadish Chandra, learned counsel appearing for the respondent Company would contend that merely on the ground that no opportunity for hearing was given, the impugned orders have to be set aside and thus, the Tribunal is right in quashing the four impugned orders on that ground. It would be his further contention that C-18 notices were not furnished with full particulars and on this ground too, they have to be set aside. It would also be his argument that the Corporation cannot straightaway pass orders under Section 45-A of the Act and instead, it should have approached the ESI Court for the purpose of adjudication.

10. I have carefully considered the rival submissions advanced by the learned counsel on either side and the citations relied on by the counsel. The points which emerge for determination before me are (i) whether opportunity of personal hearing was afforded to the Company and (ii) whether the Corporation is right in arriving at the contribution based on notional value and pass orders under Section 45-A of the Act.

11. Before answering the above questions, it would be worthwhile to refer to Section 45-A of the E.S.I. Act which reads as under:
"Determination of contribution in certain cases:
(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under Section 45, the Corporation may, on the basis of information available to it, by order determine the amount of contributions payable in respect of the employees of that factory or establishment;
provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard."

12. On the point whether opportunity of personal hearing was given by the Corporation, I have perused all the four impugned orders passed by the Corporation under Section 45-A of the Act the first order dated 16.12.1983 for Rs.3,754.88, the second order dated 19.06.1986 for Rs.811.10, the third one dated 25.08.1986 for Rs.1,507.90 and the fourth one also dated 25.08.1986 for Rs.258.55. A perusal of these would clearly indicate that opportunity of personal hearing had been afforded by the Corporation for which there were replies from the Company only in respect of two impugned orders and in respect of remaining two impugned orders, the Company had neither replied in writing nor had it appeared in person. In that view of the matter, the finding of the Tribunal that the impugned orders had been passed without giving opportunity for personal hearing cannot be sustained.
13. As far as the two impugned orders for which there was no reply from the Company, the Corporation has verified the books of accounts and ledgers available with it and has also taken into consideration the reports of two Inspectors marked as Exs.B.1 and B.2. Even in this case, it is clear that the Corporation has determined the contribution based on the information available. This power of determining the contribution based on the information available with it is conferred on it by Section 45-A of the ESI Act extracted above. Had the Corporation not acted as per the powers conferred on it by the said Section, then, the very purpose of the ESI Act, which is a beneficial piece of legislation as for the employees are concerned, would have been defeated. This finding of mine is substantiated by the decision of the Delhi High Court reported in 1982 LAB I.C. 833 (supra).

14. Next, as rightly pointed out by the counsel for the appellant Corporation, the Tribunal, having come to the conclusion that the petition in respect of impugned order dated 16.12.1983 is time-barred, should not have set aside the said impugned order. The decision of this Court reported in 2000 (4) LLN 927 (supra) relied on by the counsel for the appellant Corporation is very clear on this aspect and is very much applicable to the facts of the case on hand. In such a view of the matter, I am of the considered view that the Tribunal has erroneously set aside the impugned order dated 16.12.1983.

15. With regard to the contention of the counsel for the first respondent that the Corporation should have approached the ESI court instead of passing orders under Section 45-A of the Act, some useful reference could be made to a decision of the Supreme Court reported in 1997 (II) LLJ 739 in the case of Employees' State Insurance Corporation vs. F. Fibre Bangalore P. Ltd. wherein it was held as under: (para 3)
". . .Though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise, the Act would become unworkable and defeat the object and purpose of the Act."

16. From a reading of the above, it can be seen that it is for the employer who had committed default to approach the ESI Court seeking adjudication and not the Corporation, as contended by the counsel for the Company.

Thus, in the light of my above findings, I hold that the Corporation has acted only within the powers conferred on it by the Act and that too, only after affording ample opportunity of hearing; as such, the order of the Tribunal which is under challenge before me is liable to be quashed and is accordingly quashed and in the result, the appeal stands allowed without any order as to costs.

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To

1. The Principal Judge
City Civil Court
Madras

2. The Record Keeper
V.R. Section
High Court of Madras

[SANT 8635]